1988

Gunnison Valley Bank v. Darwin and Gwen Jensen, husband and wife, Charles F. Young and Dorothy Young, husband and wife : Brief of Appellant

Utah Supreme Court

W. Eugene Hansen; Hansen, Thompson and Dewsnup; Attorney for Respondents.
Dale M. Dorius; Attorney for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

GUNNISON VALLEY BANK,

Plaintiff and
Appellant,

88-0137-CA

vs.

Case No. 860200

DARWIN and GWEN JENSEN, husband and wife, CHARLES F. YOUNG and DOROTHY YOUNG, husband and wife,

Defendants and
Respondents.

APPELLANT'S BRIEF

Appeal from a judgment on a jury verdict and final orders of the Honorable DON V. TIBBS, District Judge in the Sixth Judicial District Court of Sanpete County, judgment entered on March 20, 1986.

DALE M. DORIUS
P. O. Box U
29 South Main Street
Brigham City, UT 84302

Attorney for Plaintiff-
Appellant

W. EUGENE HANSEN
HANSEN, THOMPSON & DEWSNUP
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, UT 84111

Attorney for Defendants-
Respondents

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STATEMENT OF FACTS

Appellant GUNNISON VALLEY BANK, a Utah Corporation, has its principal place of business in Gunnison, Utah. On August 11, 1981, Respondents DARWIN and GWEN JENSEN obtained a loan from Appellant in the sum of $21,000.00. (T. 73, 78 and P Exhibit 2). On the same day they obtained the loan, Respondents executed a Promissory Note which specifically stated that the note was secured by "a real estate mortgage on residence in Gunnison, Utah" (T. 73-74 and P Exhibit 2). That mortgage was executed on August 11, 1981. However, the mortgage document was given to Respondents to have it recorded, which they failed to do. No copy was made (T. 88, 123-124). Respondents failed to produce the mortgage for trial although it was under their control. They do not deny that there was a mortgage but they deny that it was a mortgage on their home (T. 267). The mortgage is now presumably lost or destroyed.

Five documents were signed by Respondents on August 11, 1981, in connection with the loan. These documents all refer specifically to the mortgage on Respondents' residence. In addition to the Promissory Note secured by a "real estate mortgage on residence in Gunnison, Utah" (P Exhibit 2), the disclosure statement says, "This loan is secured by Real Estate Mortgage on residence in Gunnison, Utah" (T. 74 and P Exhibit 2). Two notices of a right of rescission, one signed by Respondent DARWIN JENSEN and the other signed by his wife GWEN JENSEN, say, "You have entered dinto a transaction on August 11, 1981 which may result in a lien, mortgage, or other security interest on your home" (T. 89,

92, 110-111 and P Exhibits 4 and 8). The flood insurance document authorizes Appellant to insure "the captioned property" under F.D.I.C. regulations requiring flood insurance on "property pledged as security for a loan with our bank" if such property is located within a flood hazard area (T. 92-93 and P Exhibit 5).

In addition to the five documents signed by Respondents, there are two other documents which refer specifically to the mortgage. The appraisers' report says that the appraised property at 182 East 1st South, Gunnison, Utah, is a residence appraised at $42,000.00 "offered as security" for a $21,000.00 loan. For the legal description of the land, it says, "See mortgage" (T. 76-78 and P Exhibit 1). Finally, the State Farm homeowners' insurance policy adds Appellant, Gunnison Valley Bank, as "Mortgagee" on the 180 East 100 South residence of Darwin and Gwen Jensen effective August 18, 1981 (T. 94-95 and P Exhibit 1).

On August 11, 1981, the date the loan was obtained, Appellant gave Respondent the executed mortgage with instructions to obtain title insurance and to deliver the mortgage to the title company and request the title company to have the mortgage recorded (T. 123-124).

On March 16, 1983, Respondents, then eight months delinquent in their payments on the Promissory Note, deeded their mortgaged residence to their friends, CHARLES F. and DOROTHY YOUNG (R. 63-66, 94, 141-142; T. 214, 216, 261, 377). The home was valued by Respondent at $60,000.00 after remodeling (T.332). Because of the mortgage securing the Promissory Note in favor of Appellant,

Respondents made a sham transfer of their residence for token consideration of $3,000.00 (R.64) to be paid if the Youngs ever moved to Utah, not by cash but by "services rendered by purchasers" (R. 94). There was no written contract of the purchase price (R. 94). Three years later, in February, 1986, purchasers still lived in California and Respondents were still in possession of their home (T. 261).

Since Respondents defaulted on the Promissory Note, Appellant began a mortgage foreclosure action. The jury trial commenced February 13, 1986, before the Honorable Don V. Tibbs, District Judge in the Sixth Judicial District Court, State of Utah, Sanpete County.

At the close of Plaintiff-Appellant's case, the court directed a verdict that Respondents gave no mortgage to secure their indebtedness on the Promissory Note and thus that the jury could not consider the lost document issue (T. 217-218). Seven documents referring specifically to the mortgage had already been introduced and admitted (P Exhibits 1, 2, 4, 5, 6 and 8).

Also at the close of Appellant's case, the court dismissed the second cause of action, fraudulent conveyance, as a matter of law (T. 218) and refused to reopen the case to allow Plaintiff-Appellant to introduce the deed evidencing the fraudulent conveyance of the mortgaged property (T. 216). The deed, Plaintiff's Exhibit 23, was in Appellant's file in the court room and the necessary authenticating witness was present.

The court instructed the jury in Jury Instruction 8 (T. 414)

that Respondents did not dispute the remaining debt on the Promissory Note of $19,902.94 plus interest of $11,405.76)T. 274-275, 394, 413-414). All three verdict forms included that Respondents owed Appellants the debt under the Promissory Note. The only jury question was whether, after granting Appellant's recovery on the note, Respondents were entitled to no recovery (verdict form number 1), to offsets (verdict from number 2), or to damages (verdict form number 3) (T. 428-429).

The jury returned verdict number 3, which, due to an inadvertence, did not include a space for Appellant's recovery on the Promissory Note. Damages and punitive damages in favor of Respondents totaling $13,500.00 were awarded, but Appellant was denied any recovery. Appellant disputed the verdict but judgment was entered denying Appellant any recovery, despite the jury instruction. Appellant appeals from that verdict and judgment.

SUMMARY OF ARGUMENT

This case should be remanded because the trial court made an error in law and seriously abused his discretion under Rule 59 of the Utah Rules of Civil Procedure when he directed a verdict against ample evidence under which a reasonable person could have found for Appellant. See Management Committee v. Graystone Pines, Utah, 652 P.2d 896 at 897-898 (1982) and Asay v. Rappleye, Utah 593 P.2d 132 at 133 (1979). Finally, the judgment should be set aside because the jury verdict was contrary to Jury Instruction 8 and against the great weight of evidence.

First, the court made an erroneous ruling of law. The court

ruled that there was no mortgage to secure Respondents' indebtedness. This ruling was made despite overwhelming secondary evidence showing there was a mortgage, now lost, destroyed, or not produced by Respondent, who was the last party to have possession of the document. Under Rule 70(2) of the Utah Rules of Evidence applicable at the time, secondary evidence is admissible to prove the existence and contents of a lost document and the jury should weigh such evidence. U.C.A. 78-25-16 (1) and (2) says that parol evidence may be used to establish contents of lost or destroyed writings and writings where, as here, the opponent possesses the original and fails to produce it. Appellant was denied its first cause of action, mortgage foreclosure, by the court's erroneous ruling.

Second, the court abused discretion in not reopening the case after the presentation of Plaintiff's evidence. Plaintiff-Appellant asked the court to reopen to allow introduction of the deed which was crucial to its second cause of action, fraudulent conveyance (P Exhibit 23). Under the standards set by this Court, reopening should have been allowed since the request was timely, delay would have been nil, respondents would not have been prejudiced thereby, and fairness and substantial justice demanded reopening the case. The result of not reopening was that the court ruled as a matter of law that there was no fraud. Evidence of fraud should have been allowed and the fraud issue should have been a jury question.

Third, the jury verdict and the judgment entered were

contrary to Jury Instruction 8 and all three verdict forms. The court found that Respondents owed Appellant $19,902.94 plus interest of $11,405.76 on the Promissory Note. The debt was not in dispute. All three verdict forms included that the debt was owed. Yet the verdict the jury returned awarded Respondents damages and punitive damages totaling $13,500.00 but gave no recovery to Appellant. The wording of the form left the jury confused. They were instructed to find damages in a specific amount as a "balance" after the Promissory Note debt was considered. But in order to erase the total debt on the Promissory Note, damages should have totaled $31,308.70. In order to give Respondent any recovery, damages should have totaled more than $31,308.70. Therefore, the jury verdict and judgment entered should be set aside as a miscarriage of justice.

Under Rule 51 of the Utah Rules of Civil Procedure, "the appellate court, in its discretion and in the interest of justice, may review the giving or failure to give an instruction" even if counsel made no objection at the trial. In Cook Assoc., Inc. vs. Warnick, Utah, 664 P.2d 1161 at 1164 (1983), this Court says that if a verdict does not show the clear intention of the jury, the appellate court may draw inferences "from the evidence, the pleadings, the jury instructions, and other relevant portions of the record." In the instant case, the evidence and the jury instructions clearly show that the debt on the Promissory Note was not disputed and Appellant should have been awarded that amount.

ARGUMENT

POINT I

THE TRIAL COURT MADE AN ERROR IN LAW AND ABUSED HIS DISCRETION IN DIRECTING A VERDICT THAT RESPONDENTS HAD NOT GIVEN A MORTGAGE TO APPELLANT TO SECURE RESPONDENTS' INDEBTEDNESS. THERE WAS AMPLE EVIDENCE OF THE LOST MORTGAGE AND IT SHOULD HAVE BEEN A JURY QUESTION.

It is a well-established principle of law that written secondary evidence and parol evidence of the existence and contents of lost written instruments is admissible and that such evidence should go to the jury.

Rule 70 of the Utah Rules of Evidence applicable at the time Respondents defaulted on the loan says in pertinent part:

> Rule 70. DOCUMENTARY ORIGINALS, BEST EVIDENCE. (1) As tending to prove the content of a writing, no evidence other than the writing itself is admissible...unless the judge finds (a) that the writing is lost or has been destroyed without fraudulent intent on the part of the proponent,... or (c) that the opponent, at a time when the writing was under his control had been notified, expressly or by implication from the pleadings, that it would be needed at the hearing, and on request at the hearing has failed to produce it.
>
> (2) If the judge makes one of the findings specified in the preceding paragraph, secondary evidence of the content of the writing is admissible. Evidence offered by the opponent tending to prove (a) that the asserted writing never existed...is irrelevant and inadmissible upon the question of admissibility of the secondary evidence but is relevant and admissible upon the issues of the existence and content of the asserted writing to be determined by the trier of fact. (emphasis added)

Thus, under Rule 70(2), the trial court in the case at bar should have submitted the mortgage question to the jury. The secondary evidence which indisputably refers to a mortgage includes five documents signed by Respondents and two other documents. All seven documents refer specifically to the

mortgage. The Promissory Note says the loan is secured by a "Real Estate Mortgage on residence in Gunnison, Utah." The disclosure statement says, "This loan is secured by Real Estate Mortgage on residence in Gunnison, Utah." Two notices of a right of rescission say, "You have entered into a transaction on August 11, 1981 which may result in a lien, mortgage, or other security interest on your home." The flood insurance authorization form says Appellant can insure "property pledged as security for a loan with our bank" under F.D.I.C. regulations if it is located within a flood hazard area. All these documents were signed by Respondents. Unless they can show that they in fact had more than one home in Gunnison, there is no question which home was mortgaged to secure the loan.

In addition to these five documents Respondents signed, the appraisers' report says that the appraised property at 182 East 1st South, Gunnison, Utah, is a residence appraised at $42,000 "offered as security" for a $21,000.00 loan. For the legal description of the property, the report says "See mortgage." Finally, the State Farm homeowners' insurance policy adds Appellant Gunnison Valley Bank as "Mortgagee" on the 180 East 100 South residence of Darwin and Gwen Jensen effective August 18, 1981.

All seven documents were admitted into evidence before the court directed the verdict that there was no mortgage. Under Utah statutes cited above, this ruling by the court was clearly erroneous.

Subsequently adopted Utah Rules of Evidence 1004 and 1008 do not change the legal principle of admitting secondary evidence to prove the existence and contents of a lost document under Rule 70 but the new rules leave out the discretion of the trial court to make the initial determination that a document is lost. In their Utah Law Review article describing the 1983 Utah Rules of Evidence, Ronald N. Boyce and Edward L. Kimball describe the new Rule 1008 as follows:

> Rule 1008...expressly provides that the jury, if there is one, should determine the factual issues regarding whether a writing ever existed, whether a writing is an original, or whether other evidence of the contents of a writing correctly reflects the contents of the writing sought to be proved. 85 UTAH L. REV. 63 at 71 (emphasis added)

Utah code Ann. Sec. 78-25-16 also says that parol evidence of the contents of a writing is admissible "(w)hen the original is in the possession of the party against whom the evidence is offered and he fails to produce it after reasonable notice."

In addition to the Utah statutory mandate that secondary and parol evidence is admissible and that juries should determine the existence and contents of lost instruments, Utah case law is clear in allowing secondary evidence to prove the existence and contents of lost instruments. Meyer v. General American Corporation, Utah, 569 P.2d 1094 at 1096 (1977) explains the lost instrument exception to the best evidence rule as follows:

> (The best evidence rule) however, does allow secondary evidence to be submitted at the court's discretion when it is not possible to obtain the original document. (Here, since the custodian of the records refused access,) the trial court correctly admitted the

disputed testimony into evidence as a proper exception to the best evidence rule.

The lost instrument exception is explained in other Utah cases. As early as 1898, the Court said a witness could testify as to the signature on a lost contract. "(T)he written contract held by (the Plaintiff) being lost, it was competent to prove its contents" by admitting parol evidence. Nelson v. Southern Pac. Co., 18 Utah 244, 55 P. 364 at 366 (1898). The admissibility of parol evidence to prove the contents of a lost deed is detailed in another Utah case where this Court says:

> A witness testifying to the contents of a lost deed is not expected to be able to repeat it verbatim from memory.... All that parties, in such cases, can be expected to remember, is that they made a deed, to whom and about what time, for what consideration, whether warranty or quit claim and for what property. To require more would, in most instances, practically amount to an exclusion of oral evidence in the case of a lost or destroyed deed. Bingham Livery & Transfer v. McDonald, 37 Utah 457, 110 P. 56 at 61 (1910) reh'g denied July 11, 1919, quoting Perry v. Burton, 111 Illinois. 138.

In Bingham, the Plaintiff, who failed to have his deed recorded and subsequently lost it in a fire, was allowed to give the essential details from memory. See also Scott v. Crouch, 24 Utah 377, 67 P. 1068 at 1070-1071 (1902) in which this Court affirmed that secondary evidence was correctly admitted to prove that a lost deed was executed and delivered.

In addition to Utah statutory and case law, other legal sources specify the long-standing legal principle. For instance, Corpus Juris Secundum says:

> In general the loss or unintentional destruction of a written instrument does not affect the validity or

sufficiency of the transaction of which it is evidence, or the rights or liabilities of the parties....54 C.J.S. (1948) Lost Instruments Sec. 1

Circumstantial and parol evidence is admissible to prove the execution, nature, and contents of a lost instrument. Id. Sec. 13(d).

The effect of establishing a lost instrument is to restore it to its original vigor and power. Id. Sec. 16.

If the requirements of the statute (of frauds) are satisfied by a signed contract or memorandum, the contract remains enforceable even though the writing is lost or destroyed. The contents of the writing can then be proved by parol testimony and the contract enforced. Corbin on Contracts (1950) Sec. 529 Statute of Frauds. Contents of a Lost Memorandum Provable by Parol.

Since profert of a sealed instrument is not now usually required as a condition of the Plaintiff's recovery, the loss, theft, or destruction of the instrument generally has merely the effect of a loss of primary evidence which may be remedied in an action at law by the use of secondary evidence. Williston on Contracts (3d ed. 1964) Sec. 1599 Effect of Accidental Loss or Destruction of Writings.

In dealing with the general principle requiring the production of a documentary original if it is available, it has already been seen...that testimony based on recollection is an allowable mode of proof for lost documents (so long as) for documents having in themselves a legal effect-- such as deeds and contracts-- all the material parts must be established by the testimony to contents. 7 Wigmore, Evidence (Chadbourn rev. 1978) Sec. 2105(b) Document Lost or Destroyed.

The production-of-documents rule is principally aimed, not at securing a writing at all hazards and in every instance, but at securing the best obtainable evidence of its contents. Thus, if as a practical matter the document cannot be produced because it has been lost or destroyed, the production of the original is excused and other evidence of its contents becomes admissible. Failure to recognize this qualification of the basic rule would in many instances mean a return to the bygone and unlamented days in which to lose one's paper was to lose one's right. McCormick on Evidence (3d ed. 1984) Sec. 237 Excuses for Nonproduction of the Original Writing (a) Loss or Destruction. (emphasis added)

> It is a well-recognized principle that the accidental or unintentional loss or destruction of a written instrument does not, as a general rule, change or impair the obligation of the parties thereto; rights in real or personal property, or to a debt, evidenced by the instrument are not ordinarily lost. 52 Am. Jur. 2d (1970) Lost and Destroyed Instruments Sec. 2.

Thus, Utah statutory and case law as well as many other legal sources agree that secondary and parol evidence is admissible to prove a lost instrument and that such evidence should be submitted to the jury. In the instant case, the court evidently made this error in law because he did not understand this legal principle. Despite having properly admitted the seven documents previously discussed, the court said, "(E)ven if you had a mortgage, it isn't recorded, how do you prove the burden is upon you?" (T. 217). "I can't make a document...." (T. 218). The court obviously thought an unrecorded lost mortgage could be proved no matter how much secondary evidence there was. The court also was troubled that no legal description of the mortgaged property was introduced despite the fact that the street address was included on both the appraisers' report (P Exhibit 1) and the State Farm homeowners' insurance policy (P Exhibit 6). The right of rescission notices, signed by Respondents, refer to a mortgage "on your home" and the Promissory Note refers to the mortgage "on residence in Gunnison, Utah." There is no doubt which property was mortgaged. The legal description is included in a deed which the court refused to reopen the case to admit (see Point Two) (T. 214, 216, 218). If he felt the legal description was vital to establishing a lost mortgage, the court should have admitted the deed.

In addition to the court's error of law on the lost instrument issue, the court was clearly mistaken in directing a verdict that there was no mortgage. The seven documents proving the existence of a mortgage, as discussed previously, were all properly admitted. These documents refer specifically to the mortgage on Respondents' home and the evidence is not subject to conflicting interpretations. However, in spite of all the evidence, the trial court erroneously directed the verdict that no mortgage existed.

> The court may not direct a verdict respecting the establishment of a lost instrument unless the evidence is of such character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it. 54 C.J.S. (1948) Lost Instruments Sec. 14.

Utah case law agrees that the court cannot direct a verdict except where there is no dispute.

> It has long been established in our law that a court should not take the case from the jury where there is any substantial dispute in the evidence on issues of fact, but can properly do so only when the matter is so plain that there really is no conflict in the evidence upon which reasonable minds could differ. As was said for this court long ago...if...the court is in doubt whether reasonable men...might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one of law for the court. Flynn v. W.P. Harlin Construction Company, 29 Utah 2d 327, 509 P.2d 356 at 361 (1973) quoting Newton v. Oregon Short Line R. Co., 43 Utah 219, 134 P. 567 (1913).

Under the Flynn standard for directed verdicts, the court in he instant case was clearly in error. Reasonable minds certainly ɔuld have found a mortgage. This Court in Flynn said the trial ɔurt is to "consider the evidence in a light most favorable to

the party against whom it is directed." Asay v. Rappleye, Utah, 593 P.2d 132 at 133 (1979). The mortgage issue in this case should have gone to the jury.

> In directing a verdict, the court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts. A directed verdict is only appropriate when the court is able to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented. Management Committee, Etc. v. Graystone Pines, Utah, 652 P.2d 896 at 897 (1982) (footnotes omitted).

Thus, the court clearly made an error in law and abused his discretion in directing a verdict that there was no mortgage when there was ample evidence introduced in favor of finding a mortgage.

POINT TWO

> THE COURT ERRED IN NOT ALLOWING APPELLANT TO REOPEN THE CASE TO INTRODUCE THE DEED WHICH WAS CRUCIAL TO ITS SECOND CAUSE OF ACTION, FRAUDULENT CONVEYANCE.

Utah case law gives the trial court discretion "to grant a motion to reopen for the purpose of taking additional testimony after the case has been submitted but prior to entry of judgment." Lewis v. Porter, Utah, 556 P.2d 496, 497 (1976). The standard for allowing a party to reopen a case is that the court should consider a motion to reopen to take additional testimony in light of all the circumstances and grant or deny in the interest of fairness and substantial justice." Id. citing 6A Moore's Federal Practice (2d ed.), Sec. 59.04(13) p. 59-37.

Additional considerations favoring allowing a party to reopen the case are outlined in other Utah cases. These considerations

include that reopening the case would cause only minor delay, that the motion to reopen is timely, and that the Defendant's rights will not be prejudiced. Ross v. Leftwich, 14 Utah 2d 71, 377 P.2d 495 at 497 (1963) and Gardner v. Christensen, Utah, 622 P.2d 782 at 784 (1980). This Court in Gardner ruled that the trial court should have reopened the case at the beginning of Plaintiff's closing arguments to allow Plaintiff to introduce evidence as to attorney's fees since the witness was in court, the delay would have been trifling, and reopening the case would not prejudice Defendant's rights. Id. This Court in Ross ruled that the trial court should have reopened the case at the close of Plaintiff's evidence to allow Plaintiff to introduce proof vital to one of her causes of action. Ross v. Leftwich at 497. See also Girard v. Appleby, Utah, 660 P.2d 245 at 247 (1983).

In the instant case, using these standards, the trial court abused his discretion in not allowing Appellant to reopen its case to introduce the deed (P Exhibit 23). The deed showed that Respondents transferred the mortgaged property to their friends a month after they received their delinquency-foreclosure warning letter. The motion to reopen was certainly timely, made after Plaintiff rested, before Defendants began presenting their evidence. Moore's Federal Practice says a case can be reopened for additional testimony "even after the case has been submitted to the jury...." 6A Moore's Federal Practice (2d ed.), Sec. 59.04(13) p. 59-34. As in Gardner, the Defendant witness who could have authenticated the deed was present in court, the deed

was in Plaintiff's file, and the delay would have been nil. There would have been no prejudice to Defendants who supplied the deed in response to a discovery request and knew it would be evidence under the second cause of action. The deed was also mentioned in Plaintiff's opening statement so there would have been no surprise to Respondents. By not reopening the case for the introduction of the deed, the court denied Appellant "fairness and substantial justice."

The second cause of action, fraudulent conveyance, should have been a jury question. Appellant would have introduced evidence that Respondents deeded the home to their friends in a sham transfer a month after receiving their delinquency notice, that there was no contract as to price, that buyer agreed to pay $3,000.00 for the house Respondent valued at $60,000.00, that the payment was not to be in cash but by services rendered (R. 64), and that three years later, at the time of trial, buyer was still living out of state and Respondent was still in possession of the house.

POINT THREE

THE JURY ERRED IN REACHING A VERDICT AND THE COURT ERRED IN ENTERING THE JUDGMENT THAT DID NOT GIVE APPELLANT RECOVERY ON THE PROMISSORY NOTE SINCE THE COURT INSTRUCTED THE JURY THAT RESPONDENTS OWED APPELLANTS $19,902.94 PLUS INTEREST.

The jury verdict and the judgment entered were contrary to Jury Instruction 8 and all three verdict forms. The court found that Respondents owed Appellant $19,902.94 plus interest of $11,405.76 on the Promissory Note. The debt was not in dispute.

All three verdict forms included that the debt was owed. The only jury question was whether, after granting recovery on the note to Appellant, Respondents were entitled to no relief (verdict form number 1), to offsets (verdict form number 2), or to damages (verdict form number 3).

The jury returned verdict form number 3 (T. 433). The verdict awarded Respondents damages of $3,500.00 and punitive damages of $10,000.00 but gave no recovery to Appellant.

In order for a verdict allowing no recovery to Appellant to be reasonable, the damages awarded should have amounted to at least the $19,902.94 debt plus interest of $11,405.76 or $31,308.70. The wording of the form returned left the jury confused. It instructed them to find specific amounts of damages as a "balance" after considering the Promissory Note debt. Since there was no place to enter the amount due on the Promissory Note, the damages would have had to be in excess of $31,308.70 to leave Respondents any recovery.

Appellant disputed the verdict. See Appellant's proposed Judgment on the Verdict and the subsequent correspondence by Respondent. Nevertheless, judgment was entered giving Appellant no recovery, a miscarriage of justice.

Rule 51 of the Utah Rules of Civil Procedure says that the appellate court has discretion "in the interest of justice" to review jury instructions even if counsel made no objection to the instructions at trial. In Cook Assoc., Inc. v. Warnick, Utah, 664 P.d 1161 at 1164 (1983) this Court says the appellate court may

draw inferences "from the evidence, the pleadings, the jury instructions, and other relevant portions of the record" in reviewing a jury verdict where the verdict does not show the clear intention of the jury. In the interest of justice, the verdict in the instant case should be reviewed in light of the evidence and the jury instructions.

CONCLUSION

This case should be remanded and the jury verdict and judgment set aside because the trial court made an error in law, seriously abused his discretion under Rule 59 of the Utah Rules of Civil Procedure, directed a verdict despite overwhelming evidence, and entered a judgment contrary to jury instructions and against the great weight of evidence.

First, the court made an erroneous ruling of law in ruling that there was no mortgage. Such a ruling in a lost instrument case is against Utah statutory and case law and against a well-established legal principle. This ruling was made despite a substantial amount of secondary evidence showing there was a mortgage, now lost, destroyed or not produced by Respondent. The jury was not allowed to consider the mortgage question and thus Appellant was deprived of its mortgage foreclosure remedy. Appellant was clearly prejudiced by the ruling. In addition, the court erroneously directed a verdict that contradicted considerable evidence, an abuse of discretion under standards set by this Court.

Second, the court abused his discretion in not reopening the case after the close of Plaintiff's case. The request to reopen was timely; delay would have been nil since the authenticating witness was in court and the deed was in Appellant's file; Defendants would not have been prejudiced since they produced the deed in discovery and were aware of the second cause of action under the complaint; and fairness and substantial justice were denied when the court ruled that as a matter of law that there was no fraud. Evidence of fraud should have been allowed and the fraud issue should have been a jury question.

Third, the jury verdict and the judgment entered were contrary to Jury Instruction 8 and all three verdict forms. The court found that Respondents owed Appellant $19,902.94 plus interest of $11,405.76 on the Promissory Note. The debt was not in dispute. All three verdict forms included that the debt was owed. Yet the verdict form the jury returned awarded Respondents damages $13,500.00 but gave no recovery to Appellant. In order for a verdict allowing no recovery to Appellant to be reasonable, the damages awarded should have amounted to at least the $19,902.94 debt plus $11,405.76 interest. The wording of the form returned left the jury confused and the verdict returned is contrary to the jury instructions and the great weight of evidence. Damages must first equal the undisputed debt in order to erase the debt. Therefore, the verdict and judgment should be set aside.

ADDENDUM

CONTENTS

Plaintiff's Exhibit #1, Appraisers' Report

Plaintiff's Exhibit #2, Promissory Note, Disclosure Statement

Plaintiff's Exhibit #4, Notice of Right of Rescission

Plaintiff's Exhibit #5, Flood Insurance Authorization

Plaintiff's Exhibit #6, Homeowners Policy

Plaintiff's Exhibit #8, Notice of Right of Rescission

Plaintiff's Exhibit #23, Warranty Deed

DATED this 27th day of November, 1986.

DALE M. DORIUS
Attorney for Appellant
P. O. Box U
29 South Main Street
Brigham City, UT 84302

CERTIFICATE OF MAILING

Served the foregoing Brief of Appellant by mailing two copies thereof, postage prepaid, to W. EUGENE HANSEN, HANSEN, THOMPSON & DEWSNUP, Attorney for Respondents, 2020 Beneficial Life Tower, 36 South State Street, Salt Lake City, UT 84111 this 27th day of November, 1986.

DALE M. DORIUS

#1
8624

APPRAISERS' REPORT---CITY PROPERTY

Date of application for real estate mortgage loan August 11, 1981

Full name of applicant Darwin Jensen and Gwen Jensen

Occupation of applicant

Amount of loan applied for $ 21,000.00

The property offered as security is located at:

182 East 1st South (Street address and number) Gunnison (City) Utah (State)

Legal description see mortgage

LAND---

The land has a frontage of 100 feet and extends back 247.5 feet.

BUILDINGS AND IMPROVEMENTS---

Date building was constructed---Month Year 1920

Building designed for use as (Residence, etc.) Residence

Type of construction Brick

Number of stories 1 Number of rooms 7 Number of baths 2

Source of water supply City Type of sewerage City

Type of heating system Oil Street paved, ☒ Yes ☐ No

Electricity, ☒ Yes ☐ No; Gas, ☐ Yes ☒ No

CERTIFICATE OF APPRAISAL COMMITTEE

I, (we) the undersigned, do hereby certify that I, (we) have carefully examined the above described roperty and that in my (our) opinion the fair value of said property as of this date is as follows:

Land $ 6,000.00 Buildings $ 36,000.00 Total $ 42,000.00

Signatures and Titles of Appraisers

Paul Andersen

Date of Appraisal August 11, 1981

Rec Dept Ck #5

Form HM-2

Due August 17, 1988 Name Darwin Jensen and Gwen Jensen No. 8978 $

August 11, 1981

On August 17, 1988 after date, for value received, the undersigned jointly and severally promise to pay to

GUNNISON VALLEY BANK, or order, at its office in Gunnison, Utah

Twenty-One Thousand and No/100 ########## DOLLARS

In lawful money of the United States together with interest payable monthly at the rate of 16.0 per cent per annum from date until paid, together with costs and expenses of realizing on the security, if any, a reasonable attorney's fee, and court costs. If the interest, or any payment on principal is not paid when due, the holder may declare the note due, without notice, and proceed by law to collect both principal and interest. If any undersigned or accommodation party becomes insolvent the holder may declare the note due. Prepayment of this note with interest to date of payment may be made at any time without penalty except that a minimum charge may be required of $5 if the amount financed does not exceed $75, or $7.50 when the amount financed exceeds $75.

The undersigned has deposited with said bank as collateral to secure the payment of this note the following property, viz:

Real estate mortgage on residence in Gunnison, Utah

Payable monthly $417.10 per month for 84 months beginning September 17, 1981. Said payments to be applied first to interest and then to principal.

and agrees that Bank or its assigns may at any time after the maturity of this note or before, if in the judgment of Bank or its assigns any items of the collateral depreciates in value or the Bank or its assigns deems itself or themselves insecure, sell all or any part thereof at public or private sale, with or without notice or demand of any kind and hold and apply the proceeds upon this note at maturity or any time thereafter. Any surplus of collateral or proceeds of sale may be held for or applied upon any liability, direct or contingent, which Bank or its assigns may then have against the undersigned. All expenses of suing upon, collecting or selling any collaterals may be deducted and the net proceeds shall be so applied. Bank or its assigns may purchase any or all items of collateral at any such sale. Any substituted or added collateral shall be subject to this contract which shall pass to and be in force in favor of any holder of this note. Bank may assign or transfer this note and any or all of the collateral securing the same, in which case the transferee shall have the same rights with respect to this note and the transferred collateral as are hereby given or as otherwise may be possessed by Bank. The undersigned and all endorsers and guarantors hereof hereby severally constitute and appoint the holder of this note their to assign, transfer and endorse in their respective names for transfer on the books of the company or otherwise, all stock certificates, registered bonds or other securities, which are or may be pledged under the terms hereof. This agreement is subject to the conditions appearing on the reverse side hereof. Presentment, demand, protest, notice of dishonor and extension of time without notice are hereby waived and the undersigned consent to the release of any security or any part thereof with or without substitution.

Address Gunnison, Utah

Darwin Jensen

Gwen Jensen

Phone

PLAINTIFF'S EXHIBIT #2 8624

NOTICE: See the reverse side for important information and conditions.

DISCLOSURE STATEMENT

Due Date 8-17-88 Note No. 8978

1. Loan Proceeds	$	21,000.00
2. Other charges:		
Credit Life Insurance (See 8 below)	$	None
Disability Insurance		None
3. Amount Financed	$	21,000.00
4. FINANCE CHARGE	$	14,036.40
5. Total of Payments $417.10/84 mos beg 9-17-81	$	35,036.40

84 payment(s) in amounts and due as provided in attached Promissory Note.

6. ANNUAL PERCENTAGE RATE 16.0 %

7. The unpaid balance may be prepaid at any time without penalty, subject to a minimum finance charge of $5 if the amount financed does not exceed $75 or $7.50 when the amount financed exceeds $75. Reasonable attorney's fees, legal expenses and lawful collection costs may also be collected.

8. Credit life insurance is not required by Lender but will be purchased if requested.

☐ Borrower desires that lender purchase credit life insurance at a cost of $

☐ Borrower desires that lender purchase credit life and Disability Insurance at a cost of $

☒ Borrower does not desire credit life or Disability Insurance

8-11-81 Date — Darwin Jensen Borrower

9. If any default occurs, Lender may offset against this loan any bank account or other amounts owed by Lender in any capacity to Borrower.

This loan is secured by Real estate mortgage on residence in Gunnison, Utah

10. If this note is converted into an installment note the following disclosures may be applicable:

Late charges may be imposed as to any installment not paid in full within 10 days after its due date and if imposed will be computed in the manner checked: ☒ a late charge of 5% of the installment, but not exceeding $5; ☒ an amount equal to the annual percentage rate stated above times the amount of the installment for the period from the due date of the installment until payment thereof, counting each day as 1/30 of a month. If both methods are checked, either may be used.

STATEMENT OF PURPOSE FOR LOANS OVER $5,000.00

Purpose Business loan

Borrower acknowledges receipt of a copy of the Note and Disclosure Statement, with all blanks completed. August 11, 1981 Date

Darwin Jensen Borrower

Gwen Jensen Borrower

Pltfs Ex #2

FOR VALUE RECEIVED, the undersigned, jointly and severally, end-orse, guarantee and promise to pay the note on the reverse hereof and ll extensions and renewals thereof, which extensions and renewals may e made without notice to or consent of the undersigned, and all taxes nd insurance premiums and any other sums that may become due and ayable under and by virtue of the provisions of any Deed of Trust or Mortgage), or other instrument of security securing the aforesaid ote, and hereby waive (a) presentment, demand, protest, notice of pro-est, notice of dishonor, and notice of non payment; (b) the right, if ny, to the benefit of, or to direct the application of, any security hypo-hecated to the holder until all indebtedness of the maker to the holder, owsoever arising, shall have been paid; (c) the right to require the older to proceed against the maker, or to pursue any other remedy in ne holder's power; and agree that the holder may proceed against the ndersigned directly and independently of the maker, and that the ces-ation of the liability of the maker for any reason other than full pay-ent, or any extension, renewal, forbearance, change of rate of inter-t, or acceptance, release or substitution of security, of any impair-ent or suspension of the holder's remedies or rights against the maker, hall not in anywise affect the liability of the undersigned hereunder. any undersigned becomes insolvent the holder may declare the whole te due. This agreement is subject to the "Conditions" below.

INT. PAID TO	AMOUNT	DATE PAID	PRINCIPAL	BALANCE

CONDITIONS

emands of performance, notices of sale, advertisements, presence of property at sale, and collection of commercial paper are hereby waived and Bank is hereby uthorized to sell hereunder any evidence of debt pledged to it. Any sale hereunder may be conducted by any auctioneer or any officer or agent of Bank.

he word "Signatories," as used herein, shall mean all makers, co-makers, guarantors, endorsers and accommodation parties.

he Signatories agree to pay prior to delinquency all taxes, charges, liens and assessment against the collateral, and upon the failure of the Signatories to do so ank at its option may pay any of them and shall be the sole judge of the legality or validity thereof and the amount necessary to discharge the same.

ll advances, charges, costs and expenses, including reasonable attorneys' fees, incurred or paid by Bank in exercising any right, power or remedy conferred by is agreement, or in the enforcement thereof, shall become a part of the indebtedness secured hereunder and shall be paid to Bank by the Signatories immediat-y and without demand, with interest thereon at the annual percentage rate disclosed in the note.

nk shall be under no duty or obligation whatsoever to make or give any presentments, demands for performances, notices of nonperformance, protests, notices protest or notices of dishonor in connection with any obligations or evidences of indebtedness held by Bank as collateral, or in connection with any obligations evidences of indebtedness which constitute in whole or in part the indebtedness secured hereunder.

on the transfer of all or any part of the indebtedness Bank may transfer all or any part of the collateral and shall be fully discharged thereafter from all bility and responsibility with respect to such collateral so transferred, and the transferee shall be vested with all the rights and powers of Bank hereunder with spect to such collateral so transferred; but with respect to any collateral not so transferred Bank shall retain all rights and powers hereby given.

til all indebtedness shall have been paid in full the power of sale and all other rights, powers and remedies granted to Bank hereunder shall continue to exist l may be exercised by Bank at any time and from time to time irrespective of the fact that the indebtedness or any part thereof may have become barred by any tute of limitations, or that the personal liability of the Signatories may have ceased.

nk may exercise its banker's lien or right of set-off with respect to the indebtedness in the same manner as if the indebtedness were unsecured. Any forbear-e or failure or delay by Bank in exercising any right, power or remedy hereunder shall not be deemed to be a waiver of such right, power or remedy, and single or partial exercise of any right, power or remedy hereunder shall not preclude the further exercise thereof; and every right, power and remedy of Bank ll continue in full force and effect until such right, power or remedy is specifically waived by an instrument in writing executed by Bank.

NOTICE OF RIGHT OF RESCISSION

#4
8624

Darwin Jesnen and Gwen Jensen
(Identification of Transaction)

NOTICE TO CUSTOMER REQUIRED BY FEDERAL LAW:

You have entered into a transaction on August 11, 1981 (Date) **which may result in a lien, mortgage, or other security interest on your home. You have a legal right under federal law to cancel this transaction, if you desire to do so, without any penalty or obligation within three business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any downpayment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying:**

Gunnison Valley Bank
(Name of Creditor)

at Gunnison, Utah 84634
(Address of Creditor's Place of Business)

by mail or telegram sent not later than midnight of Augsut 14, 1981 (Date).
You may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

I hereby cancel this transaction.

(Date) _____ (Customer's Signature) _____

See reverse side for important information about your right of rescission.

I, the Customer, hereby acknowledge receipt of 2 copies of the aforesaid Notice of Right of Rescission which have been given unto me this 11th **day of** August, **19**81.

Darwin Jesnen
(Customer's Signature)

Z-1 SF Rev.

Mtg. Dept. Ck #3

PLAINTIFF'S EXHIBIT #5 8624

Gentlemen:

As consideration for Cannison Valley Bank making us a loan or loans, secured by the captioned property, we hereby agree and authorize Cannison Valley Bank to place Flood Insurance on this property if required by F.D.I.C. regulation. (F.D.I.C. regulations require insurance on any property pledged as security for a loan with our bank, if the property is located within an area designated by the Secretary of Housing and Urban Development as having a special flood hazard, and where Flood Insurance is available under the National Flood Insurance Act of 1968.) We further agree to pay the cost of any such insurance immediately upon demand.

August 11, 1981 (Date)

As of August 11, 1981 it appears that:

☒ Property not located in flood hazard area according to flood hazard area boundary maps.

☐ Unable to determine flood hazard area because boundary map not available as of this date.

☐ Property is in flood hazard area but flood insurance not available because the community has not qualified for participation in the National Flood Insurance Program as of this date.
NOTE: After July 1, 1975 no loans secured by improved real estate or mobile homes in a designated flood hazard area may be made unless covered by flood insurance, regardless of whether or not the community has qualified to participate in the program.

☐ Property is in flood hazard area where flood insurance is available and mandatory. Evidence of flood insurance coverage has been obtained.

☐ Property is in flood hazard area according to map and borrower has been notified in accordance with regulations. (This must be done regardless of whether or not flood insurance is available.)

Above checked by _____ (Signature)

Pefe Dep Gen #4 Cpr

State Farm General Insu[rance] Company
[Stoc]k Company with Home Office in Bloomington, Illinois

Declarations

We will provide the insurance described in this policy in return for the premium and compliance with all applicable provisions of this policy.

[14-C51-5572-4] **Policy Number** Replaces No.

[Named] Insured and Mailing Address

[JSEN, DARWIN A & GWEN R]
BOX 47
[UNNISON, CO 84634]

MEMORANDUM OF INSURANCE
1090-44

"MORTGAGEE ADDED"
EFFECTIVE 8-18-81

[8-18-81] **Effective Date**
[12 MONTHS] **Policy Period**
[8-18-82] **Expiration of Policy Period**

The policy period begins and ends at 12:01 AM Standard time at the residence premises, unless otherwise shown below.

[150.5] **Inflation Coverage Index**

☐ Noon Standard time.

Automatic Renewal — If the **Policy Period** is shown as 12 months, this policy will be renewed automatically subject to the premiums, rules and forms in effect for each succeeding policy period. If this policy is terminated, we will give you and the Mortgagee/Lienholder written notice in compliance with the policy provisions or as required by law.

Form 3 **Homeowners Policy**
[m]

IF MOBILE HOME — DESCRIPTION:

PLAINTIFF'S EXHIBIT #6 8624

Limits of Liability	Property and Coverages
	Section I
[55300]	A Dwelling
[30420]	B Personal Property
[16590]	C Loss of Use
	Section II
[100000]	L Personal Liability (each occurrence)
[1999]	M Medical Payments to Others (each person)

[rms], Options and Endorsements

[?7103.1] SPECIAL FORM
[?TION J] JEWELRY AND FURS
[?TION K] FIREARMS
[?7357] AMENDATORY END

Location of Residence Premises
(If different than Mailing Address)

180 EAST 100 SOUTH
GUNNISON, CO 84634

[165.00] **Total Premium**
First Annual Premium

Credit Applied:

☐ Builders' Risk
☐ Newer Home
[Y] Home Security

[ductibles — Section I

[100] All Peril (Includes Wind, Hail and Theft unless a higher deductible is shown below.)
Wind and Hail
Theft

In case of loss under this policy, we cover only that part of the loss over the deductible stated.

[X] 1ST **Mortgagee or Lienholder** ☐ **Loss Payee** ☐ **Additional Insured**

[UNNISON VALLEY BANK
O BOX 419
UNNISON, UT 84634]

☐ 2ND **Mortgagee or Lienholder** ☐ **Loss Payee** ☐ **Additional Insured**

Prop Dep Ex #6

Countersigned Sept 1 19 81

by Allen R Wilson
Agent

[01.2 In U.S.A.]

Your policy consists of this page, any endorsements and the policy form. Keep these together.

EFFECT OF RESCISSION. When a customer exercises his right to rescind under paragraph (a) of this section, he is not liable for any finance or other charge, and any security interest becomes void upon such a rescission. Within 10 days after receipt of a notice of rescission, the creditor shall return to the customer any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the customer, at the option of the customer. If the creditor does not take possession of the property within 10 days after tender by the customer, ownership of the property vests in the customer without obligation on his part to pay for it.

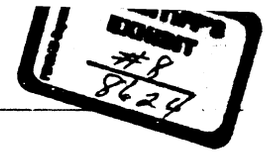
CONFIRMATION

MORE THAN 3 BUSINESS DAYS HAVE ELAPSED since the undersigned received the above and foregoing **NOTICE OF RIGHT OF RESCISSION** and other Truth-In-Lending Disclosures concerning the transaction identified on reverse hereof. The undersigned certifies that the transaction has not been rescinded.

Date Dec 2 **19** 57

(Customer's Signature)

NOTICE OF RIGHT OF RESCISSION



Darwin Jensen and Gwen Jensen
(Identification of Transaction)

NOTICE TO CUSTOMER REQUIRED BY FEDERAL LAW:

You have entered into a transaction on August 11, 1981 (Date) **which may result in a lien, mortgage, or other security interest on your home. You have a legal right under federal law to cancel this transaction, if you desire to do so, without any penalty or obligation within three business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any downpayment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying:**

Gunnison Valley Bank
(Name of Creditor)

at Gunnison, Utah 84634
(Address of Creditor's Place of Business)

by mail or telegram sent not later than midnight of August 14, 1981 (Date).
You may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

I hereby cancel this transaction.

(Date) _____ (Customer's Signature) _____

See reverse side for important information about your right of rescission.

I, the Customer, hereby acknowledge receipt of 2 copies of the aforesaid Notice of Right of Rescission which have been given unto me this 11th **day of** August, **19** 81.

(Customer's Signature) _____

Pd by Dept #7

Z-1 SF Rev.

EFFECT OF RESCISSION. When a customer exercises his right to rescind under paragraph (a) of this section, he is not liable for any finance or other charge, and any security interest becomes void upon such a rescission. Within 10 days after receipt of a notice of rescission, the creditor shall return to the customer any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the customer, at the option of the customer. If the creditor does not take possession of the property within 10 days after tender by the customer, ownership of the property vests in the customer without obligation on his part to pay for it.

CONFIRMATION

MORE THAN 3 BUSINESS DAYS HAVE ELAPSED since the undersigned received the above and foregoing **NOTICE OF RIGHT OF RESCISSION** and other Truth-In-Lending Disclosures concerning the transaction identified on reverse hereof. The undersigned certifies that the transaction has not been rescinded.

Date Aug 17 19 81

(Customer's Signature)

RECORDED
REQUEST OF Darwin Jensen
FEE PAID JANET J. LUND SANPETE COUNTY RECORDER
$ 6.50 BY [illegible] DEPUTY

WHEN RECORDED, MAIL TO:

Gunnison Blk-8-A-6
33-19-1E-11

GRANTOR'S J
GRANTEE'S

PLAINTIFF'S EXHIBIT #23 8624

Space Above for Recorder's Use

WARRANTY DEED

DARWIN JENSEN, aka DARWIN A. JENSEN, and GWEN JENSEN, aka GWEN MARIE JENSEN, his wife, grantor
of GUNNISON, County of SANPETE, State of Utah,

hereby CONVEYS and WARRANTS to CHARLES F. YOUNG and DOROTHY M. YOUNG, his wife,

405 East Fairview #7
of Glendale, County of LOS ANGELES, State of ~~Utah~~ CALIFORNIA, grantees

for the sum of TEN and 00/100- DOLLARS,

the following described tract of land in SANPETE County, State of Utah, to-wit:

1 Beginning at a point North 89° West 1.50 chains from the Northeast Corner of Block 8, Plat "A", Gunnison City Survey, Sanpete County, State of Utah; thence South 1° West 3.75 chains, thence North 89° West 1.50 chains, thence North 1° East 3.75 chains, thence South 89° East 1.50 chains to beginning. Containing 0.56 acre, more or less. Located in Lots 1 and 8, Block 8, Plat "A", Gunnison City Survey.

Together with all the improvements and appurtenances thereunto belonging or in anywise appertaining thereto, together with One (1) share of water in the Gunnison Irrigation Company.

2 Beginning 0.20 chain South and North 89° 30' East 6.33 chains from the Southwest Corner of the Southeast Quarter of Section 33, Township 19 South, Range 1 East of the Salt Lake Base and Meridian; thence South 89° 30' East 1.98 chains, thence North 1° 15' West 7.50 chains, thence South 13° 40' West 7.74 chains to point of beginning. Containing 0.74 acre.

FOR ADDITIONAL DESCRIPTIONS SEE ATTACHED RIDER MARKED EXHIBIT "A".

WITNESS the hands of said grantors, this 16th day of March, 1983

Signed in the presence of

Norma S Wanlass — Darwin A Jensen
Gwen Marie Jensen

STATE OF UTAH,
County of SANPETE } ss.

On the 16th day of March, 1983 personally appeared before me Darwin Jensen, aka Darwin A. Jensen, and Gwen Jensen, aka Gwen Marie Jensen, his wife, the signers of the above instrument, who duly acknowledged to me that they executed the same.

NORMA S. WANLASS NOTARY PUBLIC State of Utah

Norma S. Wanlass Notary Public.

My commission expires June 2, 1983 Residing in Manti, Utah 84642

APPROVED FORM — UTAH SECURITIES COMMISSION

FORM 101 — WARRANTY DEED — KELLY CO., 88 W. NINTH SO., S L C L-1108

123 Dep Depo C H C

EXHIBIT "A"

Beginning at the Southeast Corner of the Southwest Quarter of the Southeast Quarter of Section 33, Township 19 South, Range 1 East of the Salt Lake Base and Meridian; thence South 89° 30' West 11.79 chains, thence North 1° 15' West 7.70 chains, thence North 15° East 2.70 chains, thence North 89° 30' East 11.32 chains, thence North 6.16 chains, thence East 10.00 chains, thence South 10.00 chains, thence East 0.25 chain, thence South 6.36 chains, thence West 10.25 chains to beginning. Containing 28.57 acres.

Together with all the improvements and appurtenances thereunto belonging or in anywise appertaining thereto.

Darwin A. Jensen

Gwen Marie Jensen